

3. What was claimant's date or dates of accident? More particularly, did the Special Administrative Law Judge violate respondent's due process rights in finding a series of accidents through claimant's last day worked, when respondent contends that claimant's alleged date of accident was a date certain, with the date alleged at regular hearing being April 30, 2002?
4. Is respondent entitled to a K.S.A. 44-501(c) reduction in claimant's award in an amount equal to the functional impairment determined to be preexisting? Respondent contends the Special Administrative Law Judge failed to address this issue in the Award and respondent is entitled to a determination based upon the evidence contained herein.
5. Did claimant suffer an intervening accident after leaving her employment with respondent? Does this intervening accident, with a subsequent employer, eliminate respondent's responsibility to provide ongoing medical care and future permanent disability benefits under K.S.A. 44-510e? Respondent argues that while this issue was raised in respondent's submission letter and supported by competent and credible evidence, the issue was not determined by the Special Administrative Law Judge in the Award.
6. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

This matter proceeded to regular hearing on March 23, 2005, before Administrative Law Judge Nelsonna Potts Barnes. At that time, terminal dates were established, with claimant's terminal date being April 25, 2005, and respondent's terminal date being May 25, 2005. Evidence was presented and the matter submitted to the Administrative Law Judge, with respondent's submission letter being filed on May 25, 2005, and claimant's submission letter being filed on June 27, 2005, with the Division of Workers Compensation. On November 30, 2005, an Award was issued by Special Administrative Law Judge Vincent Bogart, which failed to address several of the issues raised by the parties. Respondent contends the Award violated K.S.A. 44-523 and K.S.A. 2001 Supp. 44-551. K.S.A. 44-523(c) states:

When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. The

administrative law judge shall not stay a decision due to the absence of a submission letter. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the **director shall assign the matter to an assistant director or to a special administrative law judge** who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record. (Emphasis added.)

K.S.A. 2001 Supp. 44-551(d) states, in part:

In case of emergency the director may appointment special local administrative law judges **and assign to them the examination and hearing of any designated case or cases**. Such special local administrative law judges shall be attorneys and admitted to practice law in the state of Kansas and shall, as to all cases assigned to them, exercise the same powers as provided by this section for the regular administrative law judges. (Emphasis added.)

Both K.S.A. 44-523(c) and K.S.A. 2001 Supp. 44-551(d) contemplate that some action shall be taken on the part of the Director to assign a matter to the special administrative law judge either based upon a motion of the parties or based upon the Director's own motion. Both statutes require that the Director shall "assign" the files to the special administrative law judge. The statutes clearly contemplate that any such assignment be in writing with notice provided to the parties.

In this instance, a review of the Director's file, the Administrative Law Judge's file and the Workers Compensation System action codes and docket report fails to uncover any assignment, motion or order from the Director's office. Respondent argues that the statutory assignment requires some written action on the Director's part with notice to the parties and the opportunity to be heard on the assignment. The Board acknowledges that neither K.S.A. 44-523(c) nor K.S.A. 2001 Supp. 44-551(d) specifically indicate a right to notice or a hearing nor do they even mention that the assignment should be in writing. However, the Board agrees with respondent's argument that appropriate notice is required in order for the parties to determine whether a conflict exists between the parties and the Special Administrative Law Judge.

The Kansas Court of Appeals, in *Bradford*,¹ was asked to determine whether the filing of a request for reassignment under K.S.A. 44-523(c) deprived an administrative law judge of jurisdiction to make an award. In *Bradford*, the administrative law judge set terminal dates, as in this case. Submission letters from claimant, respondent and the Kansas Workers Compensation Fund (Fund) were filed with the Division. The last

¹ *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263 (1996).

submission letter by the Fund was filed January 23, 1995. On January 20, 1995, claimant filed a written request for the decision to be entered either by the Director or an assistant director, arguing that the administrative law judge had not issued an award, even though the matter had been subject to decision for over three months. The administrative law judge issued the award before a ruling could be made on the claimant's K.S.A. 44-523(c) request for reassignment. The Court of Appeals determined that using K.S.A. 44-523(c) to invalidate an award once it has been entered would be contrary to the administrative economy that the statute is designed to facilitate. The Court, in so ruling, went on to state that the mere filing of a request under K.S.A. 44-523(c) would not act to deprive the administrative law judge of jurisdiction. The Court ruled that the administrative law judge did not lose jurisdiction of the award.

In this instance, the matter is even one step removed from *Bradford*, as no request for reassignment under K.S.A. 44-523(c) has been made by either party. Additionally, there was no determination by the Director's office under K.S.A. 2001 Supp. 44-551(d) that an emergency existed. Indeed, from the documents contained within the file, the only fact that can be gleaned is that the ALJ had failed to enter an award as required by K.S.A. 44-523(c). Put simply, this record is void of any indication how this matter came to be in the hands of a special administrative law judge. Absent a motion, order or any type of writing indicating this case was assigned to this Special Administrative Law Judge, the Board finds that the Special Administrative Law Judge did not have jurisdiction to make a determination in this matter and, therefore, the Award of the Special Administrative Law Judge dated November 30, 2005, should be set aside and the case remanded to the ALJ for an immediate determination.

The Board is conscious of the waste of resources this finding would have, not to mention the delay. Nonetheless, it is terribly troubling to learn, after the fact, and without any notice, as the parties in this case did, that the case was transferred and decided by another individual in lieu of the ALJ who actually heard the matter. And even more troubling is the fact that the file fails to reflect the existence of the assignment. At a minimum, there needs to be a written document of some sort, coupled with a notice to the parties of the assignment. Absent that minimal paper trail, there is no jurisdiction to hear this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Vincent Bogart dated November 30, 2005, should be, and is hereby, set aside.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I agree with the result reached above, which concludes that the Award entered by the (purported) Special Administrative Law Judge must be set aside and the case remanded to the assigned Administrative Law Judge. This result is required by the Kansas Supreme Court's holding in *Nguyen*² that, following the submission of the case to the administrative law judge, the parties are entitled to timely notice of the Director's appointment of a special administrative law judge for the purpose of issuing the award. As the parties received no such notice, the procedure was defective and violative of due process.

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's decision that the Special Administrative Law Judge did not have jurisdiction to decide this case. It is undisputed that the Division of Workers Compensation had jurisdiction to determine the disputed issues in this workers compensation claim. The matter was assigned to an Administrative Law Judge, litigated by the parties and all the evidence had been fully submitted for a decision.

² *Nguyen v. IBP, Inc.*, 266 Kan. 580, 586, 972 P.2d 747 (1999); See also, *Collins v. Kansas Milling Co.*, 207 Kan. 617, 620, 485 P.2d 1343 (1971); *Lawrence Preservation Alliance, Inc., v. Allen Realty, Inc.*, 16 Kan. App. 2d 93, 819 P.2d 138 (1991), *rev. denied* 250 Kan. 805 (1992).

There is also no dispute that, as pointed out by the majority, the Director of the Division of Workers Compensation has the authority to transfer a case to a special administrative law judge to conduct hearings or, as in this case, review the evidence in a fully submitted case and decide the litigated issues by written award. And on the Director's own motion, without request by the parties, a case can be reassigned for decision.

The parties indicated they were unaware this case had been assigned to a special administrative law judge until they received his Award. The Board's review of the administrative file failed to locate any written confirmation and notification from the Director that the case had been reassigned.

Respondent argues that because it did not receive written notification that the case had been assigned to the Special Administrative Law Judge, he did not have jurisdiction to issue the Award. If respondent had alleged a specific due process violation or alleged that a conflict existed between respondent and the assigned Special Administrative Law Judge, then perhaps there would be merit to the argument that the Award should be set aside and the case remanded to address such concerns and perhaps reassign the case to a different special administrative law judge.

But in this case, respondent simply argues that because it did not receive written notice that the case had been assigned, the Special Administrative Law Judge was without jurisdiction to enter the Award. This argument certainly demonstrates form over substance. Especially, considering the fact the Board conducts de novo review of the facts, as well as the law.

Can it be seriously argued that the Director did not contact Mr. Bogart, did not appoint him as a special administrative law judge and did not assign this case to him? Is it respondent's contention that a stranger, Mr. Bogart, surreptitiously walked into the Division office, picked up this file and, just for the fun of it, wrote the decision? An analysis of the facts leads to the inevitable conclusion that the Director appointed Mr. Bogart as a special administrative law judge and assigned him this case. Whatever the reason for the failure to notify the parties, it is clear that the Director has the authority to make such an assignment. Moreover, the statutes conferring that authority on the Director do not specifically mandate that the assignment be written.

Respondent did not challenge the Director's authority to assign this case to the Special Administrative Law Judge nor that the assignment in this case was, for some reason, improper. No argument was made that respondent's due process rights had been abridged. Nor was an argument made that there was a conflict between respondent and the Special Administrative Law Judge assigned this case. Absent such arguments, there is no reason to conclude the Special Administrative Law Judge was without jurisdiction to decide a case that most certainly had been assigned to him by the Director.

Finally, the remedy sought by respondent and adopted by the majority is illusory at best. What wrong is remedied by setting aside the Award? Because there is no allegation that due process rights were contravened or that there was a conflict with the Special Administrative Law Judge who issued the Award, the Director can simply prepare a written document assigning this case to the same Special Administrative Law Judge, with copies to the parties. The Special Administrative Law Judge can simply reissue the same Award with a new date. What has been accomplished, changed or remedied? Is respondent's position on appeal to the Board changed? The only practical result is that delay is accomplished in contravention of the stated intent of the Workers Compensation Act to provide for the speedy resolution of cases.

The undersigned agree that the better practice, and one followed by the Director's office both before and after this case, is for the Director to notify all the parties when a case is assigned to a special administrative law judge. This accords the parties notice regarding the status of the case. And, if warranted, allows the parties the opportunity to timely object to the assignment in the event there is a conflict between a party and the assigned special administrative law judge. But, in this case, the failure to memorialize the assignment and notify the parties, under the doctrine of *de minimis non curat lex*, should not result in setting aside the Award.

Consequently, the undersigned find the Director assigned this case to the Special Administrative Law Judge and he had jurisdiction to enter the Award. There is no demonstrated due process or other basis to set aside the Award and the Board should proceed to decide the remaining issues raised by the parties.

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Vincent Bogart, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director